



Missouri Department of Natural Resources

Clean Water Commission Water Pollution Control Program

Meeting by Conference Call

September 23, 2002

**MISSOURI CLEAN WATER COMMISSION MEETING
BY CONFERENCE CALL
September 23, 2002**

Participating

Tom Herrmann, Chairman, Missouri Clean Water Commission
Janice Greene, Commissioner, Missouri Clean Water Commission
Art Hegi, Commissioner, Missouri Clean Water Commission
Davis Minton, Vice Chairman, Missouri Clean Water Commission
Cosette Kelly, Commissioner, Missouri Clean Water Commission
Kristin Perry, Commissioner, Missouri Clean Water Commission
Jim Hull, Director of Staff
Becky Shannon, Department of Natural Resources
Deborah Neff, Assistant Attorney General
Diane Waidelich, Secretary, Missouri Clean Water Commission
Ken Midkiff, Sierra Club
Leslie Holloway, Farm Bureau

The conference call began at approximately 3:15 with Ms. Neff stating Kristin Perry had telephoned her with information that she, Commissioner Minton and Chairman Herrmann wanted a telephone conference call to discuss the justification that was sent with the 303(d) List to EPA.

Chairman Herrmann explained the controversy was generated by the submittal of the 303(d) List. The main difficulty was that the 303(d) List was due to EPA October 1, 2002, but if it wasn't submitted before August 28, a rule would have to be done which would take approximately one year. EPA expressed concern over this type of delay and the commission recognized that the next substantial revision to the list will not be prior to 2004. The list transmitted to EPA on August 27, 2002 indicates the changes were caused by actions of the commission. The August 7, 2002 meeting minutes were transmitted with the list. Chairman Herrmann noted he believes the minutes were not provided to any of the commission members.

Commissioner Perry stated her concern was that the commission specifically did not want to include those waters that were category 2. These waters were on the 1998 list due to sediment. Commissioner Perry continued that the commission at no time voted to change the pollutant to habitat loss but that is the way it was public noticed. In the submittal to EPA, it again looks one step different from what was provided to the commission and the words condition and habitat loss are included. Commissioner Perry stated she thought it was extremely clear at the meeting, although she can't find it in the minutes which is another concern, that the commission felt these waters should not be listed because there was no supporting data. She noted she does not understand the intent of the sentence above the chart on page 10 included with the August 27 submittal. Commissioner Perry stated this is a new

chart she has not seen before with this statement preceding the chart: "The following waters are proposed for delisting. Missouri DNR is not aware of any data indicating that these waters are no longer impaired." Commissioner Perry stated this submittal (page 1 of the justification) also indicates "At this time while we held the opinion that sediment deposition was a major factor in reduction of fish community diversity in Missouri streams, we had no data to support this opinion." She stated that page also talks about William Pfleger's fishes of Missouri and says he had no water quality data to document this opinion. Commissioner Perry noted habitat loss is nowhere. She continued that the concern about the list as it was submitted to EPA is that it seems the commission's intent is being circumvented. This sentence could be read to say that the commission does not want these waters listed but we don't have any data that they are not impaired although more likely you should say that we don't have any data that they are impaired which is why the commission asked for them to be delisted in the first place.

Commissioner Davis noted he pretty much concurs with Commissioner Perry's analysis. The commission received the material but did not receive the supporting information that would go along with the commission's intent. He noted he did not know how much of the minutes had been edited because he does not have them. Commissioner Davis noted it appears a lot of the intent and initiative has been lost when the commission was trying to come up with a logical and fair list. He stated it is important because of the actions taken at the August 7 commission meeting where the list was approved that, because the public notice had ended and the commission was not allowed to hear those public comments again, it would be imperative that the EPA see the minutes from the previous meeting. Commissioner Minton continued that because, as Mr. Midkiff addressed, the commission failed to do an adequate and reasonable job of public noticing the list and the intent because, had the list been public noticed, the commission would have seen an entirely different list at the August 7 meeting. Commissioner Minton noted somewhere along the line the intent of the commission has been missed and the support for the commission's action has been missed. He continued if he was an EPA representative he would look at the list and kick it and come up with another list because there is really nothing there that indicates the commission action and why it took that action. Commissioner Minton stated the commission did not get accurate information that the list had to be public noticed which was learned at the August 7 meeting. He continued it is his understanding now at this late date that until April 2003, TMDLs are required on the waters on the list that the commission had been looking at all along. Commissioner Minton stated he feels the supporting data does not reflect the commission's intentions. He stated if at all possible, he would like to see that information submitted to EPA before they make their decision.

Mr. Hull noted the minutes of the August 7, 2002 meeting have been supplied to EPA along with the August 27, 2002 letter.

Ms. Shannon stated the August 7 meeting minutes were furnished to EPA. At the time of submittal to EPA they were marked draft because the commission did not approve them until the September 5 commission meeting.

Commissioner Minton noted he is talking about the minutes from the June 26 meeting where public comment was taken. He stated those minutes are more critical than the August 7 meeting minutes.

Ms. Shannon replied comments made at the June 26 meeting occurred during the public notice period and it is appropriate to provide those to EPA if that has not already been done. She noted she believes she did send these with the submittal to EPA but she will verify that.

Commissioner Minton stated the last information he received was that only the August 7 commission meeting minutes were sent. He noted he has received the list itself and the supporting information for listing and changes but nothing for delisting and it is important that all those comments be included.

Ms. Shannon replied she will verify this. If the June minutes have been transmitted to EPA, it would have been transmitted along with all the other public comments that were received.

Chairman Herrmann stated he has a problem with the way public comments were handled at the August 7 meeting. He continued that the commission received a document that said these are the public comments and this is what we think. Chairman Herrmann stated the commission should have had those well in advance of the August 7 meeting with the briefing material so the commission had time to review the public comments.

Mr. Hull acknowledged that he understands this was a problem.

Commissioner Minton stated Mr. Midkiff picked up on some significant things the staff apparently missed and he is glad that the department acknowledged that the commission was working with information that was not pertinent to discussion and making decisions based upon that. He noted he didn't believe it really impacted the decision of the commission but it will never be known because it was not discussed in that manner. Commissioner Minton stated it's unfortunate that the commission was not aware of the circumstances of something so significant and important that pertained to the listing itself. He continued it was pointed out that there are 27 TMDLs developed and Chairman Herrmann tried to determine the difference between the 27 and the 13 the commission has received. He noted he pointed out if 27 TMDLs have been completed, we need to take credit for them. In the list sent to EPA there are only 13 TMDLs. Commissioner Minton said there is a discrepancy somewhere that needs to be clarified before EPA publishes the list.

Mr. Midkiff stated in the court ordered Consent Decree that EPA signed, there is a schedule established for the number of waterbodies each year that are to be given a TMDL. To the

best of his knowledge, DNR and EPA have met that schedule. They say that the cumulative number of waterbodies to do TMDLs on by December 31, 2002 is 28. Mr. Midkiff stated the Sierra Club specifically signed this document because they felt DNR needed to complete the easiest TMDLs first and gradually come up to the most difficult, the Missouri and Mississippi Rivers, by 2009. At this point, Mr. Midkiff stated he understands DNR and EPA are right on schedule with the court order for the cumulative number of waterbodies to be assessed.

Chairman Herrmann stated he had been getting TMDLs as they were developed in the past and he has received 13. He continued that the document submitted to EPA lists 13 completed TMDLs. There is no information that more than 13 have been completed at this time.

Ms. Midkiff stated the Sierra Club gets the TMDLs from the DNR web page but he does not know how many have been transmitted to EPA. He noted that EPA has to review each TMDL in a certain period of time and possibly that is where the discrepancy is.

Chairman Herrmann noted if more than 13 are completed, it should be reflected.

Commissioner Perry asked for the department's explanation of the chart on page 10. She stated this is not the list she saw on the category 2 waters. Commissioner Perry stated this is something new that has not been seen before and asked what the sentence prior to the list means and on what authority it was revised.

Ms. Shannon replied the 303(d) List submitted to EPA consists of pages 1-5. None of the category 2 or 4 waters that the commission asked to be removed from the list are included on pages 1-5.

Commissioner Perry stated she gets the feeling that the list that was submitted says here's what the commission says but page 10 seems to say let us tell you about the rest of the stuff.

Ms. Shannon noted, as was discussed, the department had to address all the waters on the 1998 list.

Commissioner Perry stated this is not the form that was in the 1998 list and the commission did not approve anything new for the 2002 list.

Ms. Shannon replied staff had to include information on all the waters on the 1998 list and those taken off the 2002 list.

Commissioner Minton noted on the 1998 list they were not listed as habitat loss.

Ms. Shannon acknowledged that is true.

Commissioner Minton stated staff submitted a list including them as habitat loss which is not accurate because they were never listed as habitat loss. If they were delisted they should have been delisted as they were presented from the 1998 list, not the list staff proposed for the commission to approve as the 2002 list. The habitat loss was never approved for staff to delist them.

Ms. Shannon replied the reason they are category 2 is because they are listed for habitat loss. If they were still listed for sediment, they would be category 1 waters. Ms. Shannon noted while she does not remember the exact discussion, staff may have misinterpreted this. Because the commission was acting on category 2 waters, and these waters were category 2 only because they were listed for habitat loss, she understood the commission to mean that they were being changed for habitat loss. If staff had been using the 1998 list they would be category 1 waters because they are listed for sediment on the 1998 list.

Commissioner Minton stated they would still have to be taken off as category 1 because they did not qualify as category 1 because sedimentation is no longer a mechanism by which you can consider a pollutant.

Commissioner Perry stated the submittal says that staff has the opinion that sediment deposition was a major factor but there is no data to support that opinion. She continued if that's all an opinion, the commission does not want them on the list. There needs to be data that says these waters are or are not impaired. Commissioner Perry stated the sentence seems to say something very different. The commission said there was no data to support listing them and this says there is no data supporting that they are not listed. Commissioner Perry asked where this point was not made clear when the issue was voted on.

Ms. Shannon replied the point the department had tried to make during discussion was that there is no water quality data to support the listings for sediment but that they believed that the streams are impaired because of changes in habitat. The discussion referred to earlier that talks about the change from sediment to habitat loss, was that there was no water quality data to document this opinion that sediment was the factor contributing to the loss of habitat. Ms. Shannon noted this discussion on sediment versus habitat loss was to explain why staff felt sediment was not the appropriate listing as a pollutant but rather habitat loss.

Commissioner Perry noted habitat loss has never been established as a pollutant and the list given to the commission that those were delisted on had habitat loss as the pollutant.

Ms. Shannon noted it did.

Commissioner Perry asked how this was changed to condition and pollutant sometime after the commission delisted them.

Ms. Shannon replied this was discussed.

Commissioner Perry noted the commission did not vote on anything of this nature.

Ms. Shannon replied the commission did not vote on the addition of the column titled condition.

Commissioner Davis noted these issues are probably just technicalities now but they are fairly significant when you realize there may be impending lawsuits or the list could come back totally different from the list that the commission submitted to EPA. He noted if the first thing he sees is that DNR is not supporting the data or any reason for why the commission took its action, that is pretty damning information to try to carry forth the commission's intent. Commissioner Minton stated he realizes it probably wasn't meant this way but from his discussion with Commissioner Perry, it can be understood why the issue was raised when there was a leap from sediment loss to habitat loss. He noted that one wasn't even on the 1998 list so how could you delist it from the 1998 list with a change of name of pollutant without it ever being there in the first place. Under the guise of habitat loss there was no data to support it being on the list in the first place. It will once again look like we've all missed the point. Commissioner Minton added he wished EPA was participating in the conference call because he does not know how they will understand the thought process unless someone explains this before they have to approve or deny the list submitted to them.

Mr. Hull suggested submitting a letter of clarification to EPA that would follow up on this conference call.

Commissioner Perry noted she would like to see the letter before it is sent to EPA. She asked if everyone sees the thought that this looks like it's undermining what the commission did. Commissioner Perry noted that Mr. Midkiff and Ms. Holloway were asked if they had any concerns about the commission approving only those waters on the category 1 list and she did not remember any objections.

Mr. Midkiff noted he objected on the basis that there is no provision in federal law or regulations for categories; there is more or less a mandate to prioritize the streams. He continued that he does agree with the argument over sedimentation versus habitat impairment. Sedimentation is a pollutant; habitat impairment is a result of pollution.

Commissioner Perry noted Mr. Midkiff stated publicly that habitat loss is not a pollutant.

Mr. Midkiff responded habitat loss is not a pollutant but is the result of pollution. He noted EPA agrees with this saying that habitat impairment is not a pollutant.

Commissioner Perry stated on the list where pollutant and condition are separate, there is no pollutant listed.

Mr. Midkiff noted in talking about habitat loss, there is no pollutant listed. It goes back to the 1998 list where sediment was a pollutant. The only hedge there is that there may be some of those streams where there may be something other than sediment which is inclusive but that will never be known.

Commissioner Perry stated on the list she is looking at there are more than five waters that say unspecified or unknown and she doesn't have a clue what the difference is between unspecified and unknown.

Mr. Midkiff responded he has the same vague concerns about that.

Commissioner Perry stated if we don't know what we're dealing with, TMDLs aren't going to help at all so why are we making a list of these things. She stated she thought this point was very clearly made at that meeting and none of that sort of comment is contained in the minutes or anything written in the submittal.

Chairman Herrmann noted he has a copy of Part 130 of Title 40 which is the Water Quality Planning and Management Table of Contents and categories are not listed but they do call them Parts 1-4 which are synonymous with categories 1-4.

Mr. Midkiff said these federal regulations are not yet enacted.

Commissioner Perry noted they are rules that are sitting in limbo until the October deadline.

Mr. Hull recommended drafting a letter to EPA clarifying a number of these positions of the commission. He asked what the commission wants covered in the letter.

Commissioner Perry noted the number one issue she has is specifically that what the commission had called category 2 waters are not to be on the list because they did not have supporting data whether it be water quality data. That's what is being dealt with; there was opinion and speculation.

Commissioner Kelly stated her recollection is that the commission said insufficient supporting data and she did not remember anything about speculation or opinion. She recalled some of the data was considered to be too old and some of it was considered to be insufficient. Regarding the statement that we had not found that any of the streams were not impaired may be a backward way of stating what was said. Commissioner Kelly noted she did not recall that it was ever said or voted upon that these streams are not impaired.

Commissioner Perry noted the commission wanted some research done on those because the commission felt there was not sufficient data.

Commissioner Greene noted she thought the category 2 waters were the ones the commission did not want to include in the initial list.

Mr. Hull responded that is correct.

Commissioner Greene stated the category 2 waters were the ones the commission originally did not intend to include. She continued that she voted to take them off because they were not supposed to be there to begin with, not because of the data issue. Commissioner Greene noted she remembered it was a big issue to Commissioner Perry but remembers the motion as being to take them off because they were not supposed to be on the list to begin with.

Commissioner Perry noted the message that this commission did not intend that these waters be listed needs to go to EPA a lot more clearly. She expressed concern that the wording that was submitted says the commission did not want this but we don't have any data that they shouldn't be on the list.

Ms. Shannon stated in discussing this with EPA and staff, one of the points raised is that any change from the 1998 list has to be justified. The commission wants the clarification letter to EPA to say that while there is no data to justify the change, the commission believes they should not have been placed on the 1998 list.

Commissioner Perry stated one says they should not have been placed on the list and one says there is insufficient data. She noted she thought that the data was insufficient but, her conclusions because the data was insufficient, is that they should not have ever been on the list. Commissioner Perry stated that reiterates what both Commissioner Greene and Commissioner Kelly said. She did not think the sentence provided by staff comes close to indicating what any of the commissioners intended but rather sends a different message.

Chairman Herrmann asked for a copy of the August 7 meeting minutes when the letter of clarification to EPA to get these points across is sent to the commission for review to answer some of the questions about what the commission's intent was.

Ms. Shannon stated she is trying to get EPA's contact person on the line. She noted her concern is that during early discussions with EPA she recalls they indicated regardless of the reason a water was placed on the list in 1998, staff had to have data to support any change to it now.

Mr. Hull noted the commission's position needs to be made known to EPA regardless.

Chairman Herrmann noted he hopes the commission meeting minutes reflect this but he does not know how much EPA would review those in conjunction with the list.

Ms. Shannon suggested language as follows: the commission voted to remove category 2 from the list because they did not believe the waters should have been listed in 1998.

Ms. Neff asked if these are the waters that were initially listed as sedimentation.

Ms. Shannon acknowledged that they are.

Ms. Neff noted this and the process that was gone through should be referred to and suggested: These waters were initially listed in 1998 for sedimentation and this was not appropriate. For this reason the commission did not want these waterbodies, which were erroneously listed as sedimentation, to be continued on the list because that was part of the thinking on taking them off.

Commissioner Kelly stated she does not recall this being said but possibly it would be implied by the insufficient evidence.

Commissioner Hegi noted he keeps asking and has never had answered what will be done with the TMDL list when it is completed. He continued that he attended a national on-site wastewater meeting last week in Kansas City. Commissioner Hegi stated there will be a change in CAFO rules in December regarding no runoff.

Mr. Midkiff noted there currently can be no runoff from CAFOs. They currently have to have a NPDES permit which is no-discharge. Mr. Midkiff noted he knows of nothing different in the upcoming CAFO regulations different from the existing regulations. It will not effect people who are true farmers but will affect CAFOs. No small operations will be impacted that he is aware of. Mr. Midkiff continued there was a schedule by which TMDLs were to be done where the most would be done in the years 2007-2009.

Ms. Neff stated she provided the commissioners a copy of the consent decree with the packet of information on the 303(d) List.

Commissioner Perry noted the wording for the clarification letter is good. The second item is that the chart that was submitted with the list is confusing if it's something new without some sort of explanation. Formerly the 1998 list said sediment loss. Commissioner Perry noted the explanation is to show why the 2002 list doesn't look like the 1998 list. She noted she does not understand why a list that has not been approved anywhere is being sent to EPA.

Ms. Shannon replied that chart is part of the justification package and not the list itself. There is lots of data included in this portion of the submittal that's intended just as data and information for EPA, not the list itself. She asked if an explanation of this chart is what is needed.

Commissioner Perry stated the commission never saw this chart; it looks like something that was developed after the meeting.

Ms. Shannon replied this justification document containing the chart was not put together until after the August 7 commission meeting.

Commissioner Kelly asked if there are streams on this chart that were not on the list provided to the commission at the August 7 meeting.

Commissioner Perry stated she did not know of any.

Ms. Shannon replied she is not aware of any.

Commissioner Perry noted it should go back to what the commission said that they eliminated.

Ms. Shannon stated she looks at this chart as being some of the data that would be in the 305(b) Report.

Commissioner Perry said it can go in the 305(b) Report but it does not belong in the 303(d) List explanation.

Ms. Shannon replied it's there only because these waters were on the 1998 list and to help support staff's allegation that these waters were not appropriately listed in 1998.

Commissioner Perry said if you go back to the 1998 list, why doesn't it say sediment loss; we go back to that we don't have the proper documentation to do that. She asked why something new is being created that seems to indicate another direction. Commissioner Perry said it's a whole new avenue that has not been discussed and that the commission wasn't particularly trying to go down.

Ms. Shannon noted obviously it's a very confusing situation. In order to accomplish what the commission asked staff to do as far as the delisting of the category 2 waters, staff had to provide enough information to EPA to show that they were not appropriately listed in 1998.

Commissioner Perry noted the sentence before the chart certainly does not indicate that whoever wrote this sentence thinks there wasn't appropriate data.

Commissioner Kelly stated the commission certainly isn't going to ask Becky to take out things that she knows so it will make the commission look better for taking things off the list.

Commissioner Perry responded she is trying to make the commission's position be clear; what has happened has fogged the water up.

Chairman Herrmann noted the statement "Missouri DNR is not aware of any data indicating that these waters are no longer impaired" is an inappropriate statement since the commission's position is that there was no data to put the waters on the list in 1998.

Mr. Midkiff informed the commission he was ending his participation in the conference call and thanked Mr. Hull for notifying him of the call.

Commissioner Kelly noted it really was not her opinion that the waters should have been left off the list. If the commission is going to say that she wanted to make sure that there will be opportunity to place these streams on the list later.

Commissioner Perry replied she said that we do not have data to support that those be on the list.

Commissioner Kelly noted she would like to make clear the word sufficient; there is data and it was presented.

Commissioner Perry responded she is fine with saying the commission felt the data was insufficient.

Ms. Shannon suggested the following language. The Clean Water Commission voted to remove category 2 waters on the proposed list. These waters were initially listed in 1998 for sediment. The department provided information to the commission indicating that this listing was not appropriate because of insufficient or old data. Therefore, the commission does not believe they should be maintained on the list.

Commissioner Greene noted part of the reason they were on the list is because more data needs to be collected.

Commissioner Perry responded that should be done anyway and that is why it should go on the 305(b) Report.

Commissioner Kelly asked if that could be part of the language.

Ms. Shannon suggested "the commission does believe additional data should be collected for these waters."

Ms. Holloway stated, given the discussion, it would be more appropriate to indicate that the department as well as the commission is recommending that those waters not be on the list rather than identifying only the commission.

Commissioner Perry asked if the department wouldn't agree with that.

Commissioner Kelly asked if the department didn't need to decide what they wanted to say.

Ms. Shannon stated the draft indicates that the department provided the information to the commission regarding the inappropriate listing of the waters.

Ms. Holloway stated it's the commission's decision but she believes the purpose of conveying the intent of the commission is also that the department represents the commission in this submission to EPA.

Commissioner Kelly stated she does not want to put the department in the position of having to say they've changed their mind. She continued that the department presented the waters to the commission and she hopes it was in the belief that they had collected sufficient evidence. Unless the department wants to say they made a big mistake; that would be up to the department.

Leslie Holloway said Commissioner Kelly they do it anyway.

Chairman Herrmann said he does not believe it's a mistake but an inappropriate use of words.

Mr. Hull noted he understands the commission's and staff's concerns and the wording will be worked out.

Commissioner Perry stated her second concern is what list should be submitted.

Ms. Shannon replied the list that was submitted was the first five pages attached to the transmittal letter. If the list is changed in any way, that gets to be very complicated.

Commissioner Perry noted the chart on page 10 is not a part of the original list but it does not come out of anything that was used in making the decision and that's what this is supposed to be an explanation of.

Ms. Shannon replied a statement could be added to the effect that the chart on page 10 does not clearly communicate the intent of the commission in their actions or the statement above the chart.

Commissioner Perry stated she would make this a combination of both; that's the whole reason for this meeting.

Ms. Shannon noted the intent of the commission is what has already been stated regarding the category 2 waters.

Commissioner Kelly clarified that this discussion concerns the chart only and not the list submitted to EPA.

Commissioner Perry noted it's the chart on page 10. The list on the first few pages of the submittal is the list the commission approved and nothing has been said to change that action. The concern is that the justification for that list on page 10 gets into something the commission did not intend sending a mixed message to EPA.

Commissioner Greene asked what the chart is since she does not have a copy.

Ms. Shannon stated it's a listing of those category 2 waters including the name of the waterbody, the size and units, the pollutant and the other column is condition. The difference between a pollutant and a condition was discussed at the commission meeting. This particular chart does describe conditions and those would be habitat loss and low dissolved oxygen. It indicates the source and the downstream and upstream legal description.

Commissioner Greene noted she did not understand why this is such a big issue.

Commissioner Perry stated it's almost like a proposal for something else that EPA can turn around and add. It has information that the commission did not consider such as a new column called conditions.

Commissioner Greene noted the commission discussed conditions and Commissioner Perry said that was needed as clarification.

Commissioner Perry noted if it was to be done on the list but the commission decided not to put it on the list.

Commissioner Greene noted it's not on the list but on the clarification.

Commissioner Perry stated this chart looks like a new list.

Commissioner Greene noted it's not the list; it's on the clarification part. The list is the first part of the submittal.

Mr. Hull noted the major concerns have been discussed and suggested having a draft ready for Debbie Neff's review tomorrow.

Chairman Herrmann noted he would like the commission members to approve the draft before it is finalized.

Chairman Herrmann asked how many pages the minutes entailed.

Commissioner Perry asked if these were the minutes that were in the September briefing packet.

Ms. Shannon replied they were.

Chairman Herrmann asked if those were the minutes that went to EPA.

Ms. Shannon said they were. They were marked as draft at the time they went to EPA because the commission had not yet voted on them at the September commission meeting.

Commissioner Perry noted the commission voted and approved the minutes.

Mr. Hull noted the draft letter will be sent to the commissioners since they already have the minutes. Comments should go to Diane and the final version will be sent to Tom to discuss with other commissioners as needed before sending to EPA.

Respectfully submitted,

Jim Hull
Director of Staff